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** To aid practitioners in understanding recent developments in the law, the Administrative Law Review encourages leaders in the field to share their views. The Review embraces a higher level of editorial deference to practitioner-authors to minimize the burden of publishing. The following is one such article. It is derived from a report the authors prepared for the ABA Section of Administrative Law and Regulatory Practice. The authors base their analysis upon their own experience and the confidential results of an ABA survey of government practitioners.--ED.*

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TEXT:

[*139] **I. Introduction**

In 1992, President Bush directed federal agencies to review all existing regulations and ordered a 90-day moratorium on the issuance of new regulations. n1 The experience of federal agencies in responding to this directive, as well as their general experience in conducting reviews of their existing regulations, was the subject of a program conducted by the Rulemaking Committee of the ABA's Section of Administrative Law and Regulatory Practice at its 1992 fall meeting. One general theme that came out of that program was that agencies face many problems in attempting to effectively review existing rules.

n1. Memorandum on Regulatory Coordination, 1 PUB. PAPERS 166 (Jan. 28, 1992).

As a result of that program, the Section believed that it would be valuable to further explore federal agency review of existing regulations. In April 1993, the Section Chair sent a letter/questionnaire to federal departments and agencies. n2 The letter explained the general background and the purpose of conducting the study. Twenty questions were presented addressing the following subjects: the general nature of existing regulations and reviews, public participation, the review process, staffing, impact analyses, and resources and time.

n2. Letter from Peter Strauss, Chair of the ABA's Section of Administrative Law and Regulatory Practice, to various federal agencies (Apr. 6, 1993) (see Appendix A for a copy of the letter).

[*140] Sixteen federal departments and agencies responded to the questionnaire, either in writing or by bringing their employees together in a meeting to share their experiences with the Committee. n3

n3. ABA Section of Admin. Law and Reg. Practice, Unpublished Results (1993). Because of the candor of the participating agencies, comments are generally not attributed to their sources. Without the unqualified commitment of the agencies, this report would have been impossible. A list of federal agencies and departments that participated in the study can be found in Appendix B.

II. Need for Reviews

A. LEGAL REQUIREMENTS

Agencies are directed, in various ways, to review their regulations. There are laws that require agencies specifically to conduct reviews and respond to public requests for regulatory change. There is a statute that requires agencies to measure the results of their actions, providing a framework conducive to regulatory review. Presidents may order reviews simply by sending agencies a memorandum or, more formally, by executive order. Federal departments have also established their own policies requiring regulatory review. This section discusses the various types of requirements that may lead agencies to review their regulations.

1. Statutory

A. REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act n4 was enacted to ensure that, when issuing regulations, federal agencies considered more flexible regulatory approaches for small businesses and other small entities. n5 The Regulatory Flexibility Act requires that agencies review, every ten years, existing regulations that have a significant economic impact upon a substantial number of small entities. n6 If an agency cannot complete the review within ten years, the agency head must first certify that completion of the review was not feasible and then publish the certification in the *Federal Register*. n7 The completion date for a review may be extended by one year at a time for not more than five years. n8

n4. 5 U.S.C. §§ 601-612 (1988 & Supp. V 1993).

n5. See 5 U.S.C. § 610 (1988).

n6. *Id.*

n7. *Id.*

n8. *Id.*

The purpose of a review under the Regulatory Flexibility Act is to determine whether the regulations should remain in effect, or be amended or repealed. n9 Section 610 of the statute sets out the following factors for the agency to consider:

1. the continued need for the rule;
2. the nature of complaints or comments received concerning the rule from the public;
- [*141] 3. the complexity of the rule;
4. the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
5. the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. n10

n9. *Id.*

n10. *Id.*

B. GOVERNMENT PERFORMANCE AND RESULTS ACT

The Government Performance and Results Act of 1993 (GPRA) n11 requires federal agencies to develop strategic plans prior to fiscal year (FY) 1998, prepare annual plans setting performance goals beginning with FY 1999, and report annually the actual performance compared to the goals, with the first report due in March 2000. n12

n11. 5 U.S.C. § 306 (Supp. V 1993).

n12. *See id.*

The GPRA is not directed at regulatory review. As agencies focus on program results, however, they may use the processes established under the GPRA to undertake more regulatory reviews. Regulatory reviews that both focus on eliminating unnecessary burdens on industry and result in decreased costs and potentially increased benefits fit well under the umbrella of the GPRA.

C. ADMINISTRATIVE PROCEDURE ACT

The public may provide the impetus for regulatory review. The Administrative Procedure Act (APA) n13 requires that agencies give interested parties "the right to petition for the issuance, amendment, or repeal of a rule." n14 To the extent that a petitioner seeks amendment or repeal of a rule, the petitioner, in fact, is requesting a regulatory review.

n13. 5 U.S.C. §§ 551, 553, 555, 701-706 (1988 & Supp. V 1993).

n14. 5 U.S.C. § 553(e) (1988).

The APA does not contain any specific procedural requirements concerning petitions for rulemaking. However, several agencies have issued rules that set forth information that the petition should contain, including technical, legal, and/or public policy arguments. n15

n15. *See infra* notes 67 and 69.

2. Executive Orders

A number of presidents have issued executive orders (E.O.) requiring federal agencies to review their regulations. For example, E.O. 12,044, "Improving Government Regulations," n16 was signed by President Carter and required agencies to review their existing rules "periodically." n17 Furthermore, E.O. 12,044 established criteria for reviews. Agencies were asked to consider such things as the continued need for the rule, the burdens it imposed, [*142] and whether any complaints were received about it. n18 E.O. 12,044 was terminated in April 1981. n19

n16. Exec. Order No. 12,044, 3 C.F.R. 152, (1979) *reprinted in* 5 U.S.C. § 553 (Supp. II 1978).

n17. *Id.* § 4.

n18. *Id.*

n19. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988) (revoking Exec. Order No. 12,044).

E.O. 12,866, "Regulatory Planning and Review," n20 was issued by President Clinton in September 1993. By its very title, it highlights the Clinton administration's interest in regulatory review. Section 5 of E.O. 12,866 requires federal agencies to submit to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) a program under which the agency will "periodically review its significant regulations." n21 The E.O.

directs the Administrator of OIRA to work with the Regulatory Working Group, which is comprised of the vice-president, policy advisors to the president, and the heads of agencies that have significant domestic regulatory responsibility, in order to pursue regulatory review. n22 In addition, the E.O. encourages state, local, and tribal governments to assist in identifying regulations that impose "significant or unique burdens" on them and that "appear to have outlived their justification" or are "otherwise inconsistent with the public interest." n23

n20. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in 5 U.S.C. § 601* (Supp. V. 1993).

n21. *Id.* § 5(a).

n22. *Id.* §§ 4(d), 5(b).

n23. *Id.* § 5(b).

3. Presidential Memoranda

Presidents can also direct action via a memorandum. n24 On January 28, 1992, President Bush announced in his State of the Union Address a 90-day moratorium on new regulations and a review of federal regulations. n25 That same day, he sent a memorandum to all federal departments and agencies on "Reducing the Burden of Government Regulations." n26 The memorandum called for a 90-day moratorium during which agencies were to refrain from issuing new proposed or final rules, unless they fell within specific exemptions. n27 According to the president's memorandum, during the 90-day moratorium agencies were "to evaluate existing regulations and programs and to identify and accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth." n28

n24. Since this report was written, President Clinton also has directed a regulatory review. Memorandum on Regulatory Reform, 31 WEEKLY COMP. PRES. DOC. 363 (Mar. 4, 1995).

n25. Address Before Joint Session of the Congress on the State of the Union, 28 PUB. PAPERS 156, 159 (Jun. 28, 1992).

n26. Memorandum on Reducing the Burden of Government Regulation, PUB. PAPERS 166 (Jan. 30, 1992).

n27. *Id.* at 167-68.

n28. *Id.* at 167.

The president's memorandum set forth the standards against which the existing rules were to be reviewed. These standards were:

- a. The expected benefits to society of any regulation should clearly outweigh the expected costs it imposes on society. [*143]
- b. Regulations should be fashioned to maximize net benefits to society.
- c. To the maximum extent possible, regulatory agencies should set performance standards instead of prescriptive command and control requirements, thereby allowing the regulated community to achieve regulatory goals at the lowest possible cost.
- d. Regulations should incorporate market mechanisms to the maximum extent possible.
- e. Regulations should provide clarity and certainty to the regulated community and should be designed to avoid needless litigation. n29

The president directed that, at the end of the review, the agencies report on what changes were made or were to be made, including the benefits associated with those changes. n30 In addition, agencies were to identify regulations that were *not* changed and to explain how they were consistent with the president's review standards. n31

n29. *Id.*

n30. *Id.* at 168.

n31. *Id.*

4. *Departmental/Agency Orders*

Some federal departments and agencies have established review cycles and review criteria in their operations manuals or orders. For example, since 1981, under the Department of Defense (DOD) Directives System Review Program, every DOD regulation is reviewed every two years. n32 The Department of the Interior (DOI), in its *Departmental Manual*, n33 and the Federal Deposit Insurance Corporation (FDIC), in its *Statement of Policy*, n34 have established five-year review cycles for their regulations.

n32. DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE DIRECTIVES SYSTEMS MANUAL (1988) (Directive 5025.1).

n33. DEPARTMENT OF THE INTERIOR, DEPARTMENTAL MANUAL § 9.2B (1985).

n34. FEDERAL DEPOSIT INSURANCE CORP., DEVELOPMENT AND REVIEW OF FDIC RULES AND REGULATIONS, *in* FDIC STATEMENTS OF POLICY 5057, 5059 (1984).

The DOD, DOI, and FDIC also set criteria for reviews of existing regulations. Like the criteria established by executive order and presidential memoranda, the criteria adopted by these organizations focus on the age of the rule and whether laws or policies have changed, its economic impacts and the burdens it may impose on industry, and whether it duplicates another federal requirement. n35

n35. *Id.*; DEPARTMENT OF DEFENSE, *supra* note 32; DEPARTMENT OF THE INTERIOR, *supra* note 33.

5. *Judicial Mandates*

A court can also remand a rule to an agency for reconsideration. Technically, the agency is being required to review the rule in light of the court's decision. Although this may not be considered a review within the normal meaning of the term, because the rule is generally one that was very recently issued and may not even have gone into effect, it affects agency resources and priorities.

[*144] B. PRACTICAL/POLICY REASONS n36

n36. Much of II.B. is based on the aggregate experience of the authors.

In addition to legal mandates to perform a review of an existing regulation, there are a number of practical or policy reasons for conducting such a review. One reason alone may be sufficient to warrant a review and a decision to revise or revoke the existing regulation. The more reasons that exist or the greater the problem that is identified, the higher the priority that should be assigned. For example, one request for an interpretation may indicate a weakness in the drafting; hundreds or thousands of requests for interpretation should indicate to the agency that it would be easier to fix the rule than to respond to all of the requests. Significant changes in a cost-benefit ratio or substantial conflicts or inconsistencies between two agencies' rules may also warrant a very high priority. The following is a list of reasons, not necessarily all-inclusive, for reviewing and possibly changing existing regulations.

1. *Change in Administration Policy*

When new presidents, cabinet secretaries, or agency administrators take office, they may want to try a different approach to solving the problem to which the existing regulation responds, or they may not see it as a problem. Alternatively, they may determine that a different level of risk is socially appropriate and decide to change the rule.

2. *Change in Cost/Benefit Numbers*

After a rule has been in effect for some time, the agency may learn that the costs or benefits predicted for the rule are quite different from the actual numbers. Costs may be greater or benefits may be lower. As a result, changes may be warranted.

3. Changes in Technology State-of-the-Art, Economic Situation, or Other Factors

When the rule was originally issued, certain requirements may not have been imposed because the technology to implement them may not have existed. Alternatively, technology may have improved so much that the original rule, especially if it was a design standard rather than a performance standard, may be hindering a regulated industry's ability to use the most effective approach. Similarly, the economic situation may have changed; for example, an industry may be suffering an economic downturn and compliance with an existing regulation may be imposing an undue burden. In addition, new scientific information could affect an earlier decision; for example, new information may indicate that a dangerous condition poses a greater or lesser risk than was previously thought. These and similar factors could warrant a review of the existing regulation.

4. Implementation/Enforcement/Litigation Problems

As inspectors work with the people subject to the regulations, as investigators examine accidents, and as attorneys try to prove violations of regulations in [*145] enforcement cases or in litigation, they and others involved in the day-to-day implementation of the regulations will identify problems. A rule thought to be clear on its face may be confusing to many. A rule thought to solve a problem may not be achieving its intended results. A rule thought to be easy to implement may turn out to be quite difficult to comply with in the real world. Finally, a court may find that a rule means something other than the agency thought. When an agency learns of these types of things, it may decide that it is necessary to review the regulation.

5. Complaints, Suggestions, and Petitions

Agencies may receive complaints or suggestions about rules they have issued. They may also receive formal petitions to revise or revoke an existing rule. (Some agencies treat a written complaint or a suggestion as an APA petition, regardless of how it was submitted.) The legitimacy of the concerns raised, or simply the number of the complaints, suggestions, or petitions, may justify a review.

6. Requests for Interpretation

Similarly, an agency may receive requests for interpretation of a rule. One request may reveal a serious problem that warrants a review, or it may simply be capable of an easy answer. Large numbers of requests for an interpretation of a rule may in themselves indicate there is a need for a change.

7. Exemption Requests

When large numbers of people request an exemption or when one request provides a legitimate basis for an exemption, but the basis would apply to a large number of people, it may be necessary to revise the regulation.

8. Overlapping and Duplicative Rules

Even when an agency makes special efforts to coordinate its rules with others who regulate in the same area, it may find after issuance of the rule that it has imposed a requirement (or that others have subsequently imposed a requirement) that unnecessarily overlaps or duplicates the requirements of other agencies. By mistake, the new rule may overlap or duplicate the agency's existing rules. Obviously, a review would be warranted.

9. Conflicts and Inconsistencies

The same is true for conflicts or inconsistencies between an agency's rules and those of another. In addition, an agency may find that it has inadvertently created a conflict or inconsistency within its own rules. Again, the matter should be reviewed.

10. Unnecessary or Obsolete Rules

As circumstances change, as agencies issue other rules, or as statutory authority is eliminated, agency rules may become unnecessary or obsolete. Although [*146] sometimes this may simply be a "housekeeping" problem for the agency, failure to revoke unnecessary or obsolete rules may cause confusion among those affected by the rules.

III. Formal versus Informal Review

One of the most frequent problems encountered in this study of the review of existing regulations is the failure to recognize any review of regulations other than a "formal" review. Many believe that to review existing regulations--e.g., to determine whether Part 99 should be revised or revoked--the agency must state that: "This year we will review Part 99." Anything short of this, some believe, indicates a failure of the agency to examine the rule to see if it is working as intended. However, as part of its daily operation, a well-run agency is constantly, "informally" reviewing its regulations.

There is also a lack of a clear concept of what a review involves. Does it involve simply looking at Part 99 and concluding that no changes are warranted? Does it involve preparation of a document indicating why no changes are warranted? Does it require written analyses of such things as costs and benefits? Should there be coordination with certain offices or other agencies? Should there be public participation? A president may direct a review of regulations and some agencies might respond by spending hundreds of hours reviewing their Part 99 while others might simply refresh themselves on what their Part 99 covers, reporting that they are not aware of any problems, and then conclude the review.

The purpose of this section is to describe briefly what a review involves and to explain the differences between the formal and informal approaches.

A. GENERAL

For the purpose of this report, a review is defined as an analysis of an existing regulation to determine whether it needs to be revised or revoked. The extent of the analysis, documentation, and coordination should vary with the subject matter. Whatever the agency's process for conducting the review, it should not conclude the review until it has gathered and considered information concerning the factors described in section II.B. (or other agency-specific or legally mandated factors).

B. FORMAL REVIEWS

A formal review is one that is mandated. It may also be subject to a timetable. For example, the mandate may require a review of a particular regulation (or set of regulations) by a certain date or a review of all regulations over a specified time period (e.g., ten years, with one-tenth required every year). Finally, it is not necessary that a problem be identified to generate the review; rather, a review may be conducted simply because its time has come. As noted earlier, reviews can be mandated by Congress, the president, or the agency. n37

n37. *See supra* part II.A.1-4.

[*147] C. INFORMAL REVIEWS

Informal reviews are a routine, daily occurrence in which, during the general operations of the agency, problems with existing rules are identified that may warrant further action. Investigators and others who work with the regulated parties may note a continuing problem in implementing rules; attorneys may note problems in enforcing, interpreting, or litigating over rules; and accidents, congressional interest, media interest, and other events may result in discussions within an agency that may, in turn, result in a decision to change rules.

Agencies also receive reports and advice from organizations such as the agency's Inspector General or the General Accounting Office. They receive recommendations from advisory committees that meet regularly on a variety of issues or that are established on a one-time basis to look at one problem. Agencies receive numerous letters or petitions from the public that help to identify necessary changes. Some agencies have regular meetings with industries affected by their regulations, interest groups, and government organizations that regulate the same industries or affect the same population. For example, the Department of Transportation's National Highway Traffic Safety Administration has public meetings with the auto industry and other persons on a quarterly basis; among other things, these meetings provide an opportunity for the Department to learn about problems arising from existing regulations. n38

n38. *Cf.* 1 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 4.3 (1985).

Senior policy officials throughout departments and agencies meet on a frequent basis to discuss current issues. Agencies will use the information coming in from these various sources to help them quickly identify problems and, if

resources permit, make corrections. For example, based on its daily review of information coming in following an aircraft accident in which failure to deice was a factor, the Department of Transportation's Federal Aviation Administration (FAA) quickly held a public meeting to review existing deicing requirements. At that meeting, it was agreed that more could be done prior to takeoff to check aircraft for icing conditions. Before the next winter, the FAA issued a proposed and then a final rule. n39

n39. *57 Fed. Reg. 44,942 (1992)* (to be codified at 14 C.F.R. § 121.629(b)-(d)).

IV. Summary of Agency Practices and Problems n40

n40. *See supra* note 3.

A. NEED FOR REVIEWS

"Reviews are effective." "We would like to do more." Agencies admit that the failure to update regulations may lead to problems. Regulations may prohibit industries from keeping up with state-of-the-art technology that might result in better medicines or medical devices, increased public or worker safety, or environmental protection.

Agencies agree that they cannot ignore the need to review their regulations [*148] and that, as a general proposition, whether mandatory or discretionary, periodic review of existing regulations is a sound idea.

B. TIME AND RESOURCE CONSTRAINTS

"We know what needs to be changed, but we don't have the time or the resources to do it." Agencies find that scarce resources are a daunting barrier between what is possible and what is preferable. One agency's regulations may include more than 100 parts in one title of the Code of Federal Regulations (CFR), printed on thousands of pages. The agencies almost universally state that time and resources are too limited to allow for regular, systematic reviews, although some smaller regulatory agencies do have regular planned reviews. Excessive time and scarce resources devoted to a formal review of all regulations could result in insufficient attention to other regulatory needs or statutory mandates. In some instances, a formal review of all regulations of one agency may result in the elimination of several obsolete rules, but may preclude consideration of a more important regulatory action. Interestingly, one agency that said it has "ample resources to keep the review process manageable" and regularly reviews its rules also noted that "we have not experienced significant improvements in our rulemaking as a result of the reviews, and the benefits have not outweighed the disadvantage of delayed rulemaking."

It must also be remembered that writing regulations competes not only against reviewing regulations, but also against other agency priorities. For example, the people or resources devoted to drafting rules may also be necessary for inspecting plants, handling litigation, or issuing licenses.

While many agencies are concerned about the scarcity of resources for regular, systematic reviews, they generally have to find the resources to review regulations for reasons including statutory changes, court decisions, resolution of policy issues, participation in international standards-setting organizations, petitions for rule-making, changes in industry practices, and their own enforcement experience. Even their response in those cases, however, may not be as quick as they would like because of a combination of inadequate resources and higher priorities.

Agency concern about time constraints was not limited to allocation of scarce resources to competing priorities. They expressed concern about external time constraints to complete reviews. They suggested that the presidentially-initiated review during the Bush administration did not give the agencies enough time to conduct thorough reviews, and many said that it produced little of value. Because the agencies were required to review all their regulations in 90 days, some agencies had to review on average more than one part of the CFR each day. One part could contain hundreds or thousands of requirements. Some agencies received large volumes of public comments in response to the reviews, which made the task particularly difficult.

C. IDENTIFICATION OF PROBLEMS

"The agency will generally only review a rule when it thinks something is wrong." "If the rule is not working, we will hear about it." Many agencies [*149] believe that, through their routine activities, they will hear about problems with a rule. Many also said they either received little response to routine requests (e.g., in their semiannual Regulatory Agenda) n41 for suggestions on what to review or what they received was of little value. Some commentators, for ex-

ample, complained about pending proposed rules rather than existing rules. Others failed to provide any supporting data or suggested changes with little merit or in areas where the agency has no authority to make the change. Some agencies noted that they often had to request more information from petitioners. Some noted that potential petitioners do not come to the agency--perhaps thinking they will have no success--but, rather, go to Congress with their problems.

n41. Regulatory Agendas summarize current and projected rulemaking reviews of existing regulations and actions completed since the last Agenda. They are currently required by Exec. Order No. 12,866, *supra* note 20, and the Regulatory Flexibility Act, 5 U.S.C. § 602 (1988).

On the other hand, agencies have found that focused requests for identification of problems are more successful. Some have done that by limiting the subject matter of the review. Special, non-routine requests for information may also help, especially if additional steps (e.g., press releases) are taken to draw attention to the request. Some agencies ask specific questions in a *Federal Register* notice announcing the review and request for information; these questions can focus attention on areas where the agency thinks there may be problems or on areas it wishes to explore. Advisory committees can also be valuable sources; they can promote valuable discussions, help identify problems, and gather information. Some have found fact-gathering hearings or meetings quite valuable. Some have found it helpful to have regular meetings with those in the agency who help implement or enforce the regulations. The give-and-take in such meetings can help to identify problems clearly.

Data collection and analysis are essential to effective agency decisionmaking. Many agencies appear not to have the resources to develop a routine approach to gathering information on everything from changes in costs or benefits to changes in technology or state-of-the-art. Nor do they have a process for gathering information on such things as complaints or enforcement problems. Again, many agencies believe that if they have a problem, they "will hear about it."

D. PROCESS VARIATIONS

"To review by subject, impact, or particular rule, that is the question." Agencies vary, and the same review structure will not work for all of them. The approach to review varies by agency and many agencies use multiple approaches. Some agencies review their regulations by general subject areas, including one or more CFR parts. Many agencies said that this was the only way to accomplish any significant review. However, this can also be a daunting task. The Department of Transportation's FAA found that review of its aircraft certification regulations, which covered only 11 of its total of 73 CFR parts, resulted in almost 2,000 public suggestions for change. After public hearings [*150] and other steps to narrow the suggested changes, the FAA issued eight Notices of Proposed Rulemaking of approximately 200 pages each, proposing nearly 600 changes. About 500 of the proposals were adopted in nine final rules averaging about 200 pages. The whole process took eight years to complete. n42

n42. 14 C.F.R. §§ 21, 23, 25, 61, 63, 65, 67, 121, 125, 127, 139 (1995).

Other agencies choose to conduct reviews by subject matter. The Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) regulates the import of animals into the United States. It changed its rules so that regulation is by type of animal, rather than by subjects such as inspection, disinfection, quarantine location, and port designation. n43 APHIS believes that this change has made reviews of these regulations easier. Some agencies engage in cross-cutting reviews. Rather than reviewing its rules pollutant by pollutant, the Environmental Protection Agency (EPA) has set out to reexamine the regulatory problems of six industries: iron and steel, electronics, metal plating and finishing, automobiles, printing, and oil refining. The EPA will attempt to analyze the environmental impacts of these industries and the gamut of emissions problems they pose.

n43. 9 C.F.R. §§ 92-93 (1995).

Some agencies conduct multiagency reviews. Several agencies have been increasingly engaged in interagency reviews of their regulations in order to avoid interagency regulatory conflicts and gaps. The EPA and the Research and Special Programs Administration (RSPA) within the Department of Transportation (DOT) have worked together to review their rules affecting the hazardous waste industry. The Food and Drug Administration, the Occupational Safety and Health Administration, the Centers for Disease Control, APHIS, EPA, and RSPA have been reviewing the regulation of infectious substances to ensure worker protection and public safety.

Agencies also review their regulations in response to petitions for rulemaking, exemptions, or variances, with varying frequency. Some agencies are petitioned frequently. The National Highway Traffic Safety Administration receives numerous petitions every year. Others receive relatively few. The Social Security Administration received two in the last five years. The DOT's Maritime Administration may receive a petition once every three to four years.

E. REGULATORY REVIEW STAFF

"Who can afford such a luxury?" The Research and Special Programs Administration (RSPA) within the Department of Transportation has an established branch with a mission to conduct regulatory reviews. The Exemptions and Terminations Branch within RSPA's Office of Hazardous Materials Standards was established 20 years ago to improve the quality of existing and future regulations through review and revision. Historically, it has reviewed exemptions to regulations issued by the agency in order to incorporate those exemptions into the regulations by regulatory modification and to terminate the exemptions. [*151] It has also reviewed agency regulations to ensure that regulations not based on a well-defined need or specific problem are eliminated. A core function of the branch is to remain apprised of industry practices. More recently, however, with its increasingly busy regulatory agenda, this branch has conducted few reviews and has, in practice, become another arm of the Regulations Development Branch with a focus on regulations that respond to statutory mandates.

Generally, the Food Safety and Inspection Service (FSIS) at the Department of Agriculture has a separate office conduct reviews. FSIS asserted that this assignment was *not* based on a concern about objectivity. Indeed, only one agency noted that the failure to have an established organizational entity resulted in a resistance to change by the staff who originally wrote the rule. The majority of agencies rely on the professionalism of their staff and have not found any lack of objectivity during reviews. FSIS did see one potential problem with having a separate office to conduct reviews: the review staff may not have the level of expertise of the staff that wrote the rule.

Agencies that asked the same office that wrote the rule to review it were generally pleased with that staffing decision.ⁿ⁴⁴ They found that the originating office has the technical expertise with regard to the program, which is vital to the rulemaking review. Some of those agencies noted that staff may have transferred, been reassigned, or retired. This type of staff turnover provides for fresh approaches.

ⁿ⁴⁴ Cf. 1 KOCH, *supra* note 38, § 2.48 (discussing congressional supervision of administrative programs).

While some agencies assign the review of regulations to the same office that was responsible for the original regulation, others establish ad hoc teams or task forces to conduct some or all of their reviews. For example, the Nuclear Regulatory Commission employs a special team comprised of representatives from a number of program offices, including the Office of the General Counsel.

F. STATUTORY AND JUDICIAL MANDATES

"Congress is setting our agenda." Although reviews might well be worthwhile, many agencies noted that they did not have the flexibility to use their resources to conduct reviews because of statutory mandates. Congress increasingly directs agencies to conduct rulemakings on specific subjects. Congress is not only mandating agency regulation, it is mandating deadlines for issuance of those regulations; agencies are finding it more and more difficult to set their own regulatory priorities and to initiate their own reviews. Failure to meet a statutory mandate may result in congressional "pressure," lawsuits, or future appropriations cutbacks, which could adversely impact an agency's ability to address its basic regulatory concerns.

Agencies readily admit that congressional mandates do not result only from congressional interest in setting the nation's health, safety, or environmental priorities. Rather, congressional mandates result also from the affected public's [*152] encouragement of congressional intervention in an agency's regulatory agenda. Even agencies with clear procedures for petitions for rulemaking often find that the regulated community prefers to seek legislative change in lieu of petitioning the agency.

Courts, too, have a role in setting an agency rulemaking agenda, and this lessens an agency's opportunity to conduct reviews. Agencies agree that meeting statutory deadlines or court mandates for new rules must be given a higher priority than discretionary reviews of existing rules. Even those agencies that set a schedule for reviews often are unable to undertake as many regularly scheduled reviews as they would like, because of these mandates.

G. LEGAL CONSTRAINTS

"If it weren't for the legal constraints, it would be much easier to do reviews." Generally, agencies support public involvement in conducting reviews. Some state that they would have engaged in more outreach but for the constraints of the Federal Advisory Committee Act. n45 Additionally, E.O. 12,838, "Termination and Limitation of Federal Advisory Committees," limits new advisory committees to those where "compelling considerations necessitate creation." n46 Approval for a new committee is to be "granted only sparingly and only if compelled by considerations of national security, health or safety, or similar national interests." n47 Some agencies believe that the difficulties in establishing an advisory committee, including requirements for approved memberships and consensus decisionmaking, hamper public participation. Others would like to send out surveys but feel limited by the Paperwork Reduction Act. n48 Still others found the number of different executive orders that must be considered when issuing a rule just plain burdensome. n49 These agencies would prefer that the executive orders related to rulemaking be terminated or consolidated. A few agencies found that the rulemaking process itself was too slow to allow them to keep up with changes in the state-of-the-art or to make other necessary changes. Issuing a Notice of Proposed Rulemaking, providing for public comment, and drafting and obtaining approvals for the issuance of a Final Rule often takes a lengthy period of time. n50

n45. *5 U.S.C. app. §§ 1-15* (1988 & Supp. V 1993).

n46. Exec. Order No. 12,838, 3 C.F.R. 590 (1994), *reprinted in 5 U.S.C. app. § 14* (Supp. V 1993).

n47. *Id.*

n48. *44 U.S.C. §§ 3501-3520* (1988 & Supp. V 1993).

n49. In addition to Exec. Order No. 12,866, *supra* note 20 and Exec. Order No. 12,838, *supra* note 46, there are executive orders on federalism (Exec. Order No. 12,612, 3 C.F.R. 252, 255-56 (1988), *reprinted in 5 U.S.C. § 601* (1988)), takings "for which just compensation is required" (Exec. Order No. 12,630, 3 C.F.R. 554,555 (1989), *reprinted in 5 U.S.C. § 601* (1988)), family impacts (Exec. Order No. 12,606, 3 C.F.R. 241 (1988), *reprinted in 5 U.S.C. § 601* (1988)), civil justice reform (Exec. Order No. 12,778, 3 C.F.R. 359 (1992), *reprinted in 28 U.S.C. § 519* (1991)), and unfunded mandates imposed on state, local, or tribal governments (Exec. Order No. 12,875, 3 C.F.R. 669 (1994), *reprinted in 5 U.S.C. § 601* (1994)). There are also executive orders that apply to specific categories of rules (e.g., requirements for clearance by particular agencies).

n50. *See generally* 1 KOCH, *supra* note 38, §§ 4.1-.97 (discussing rulemaking procedure).

[*153] H. "ENTRENCHED" RULES

Woodrow Wilson once said, "If you want to make enemies, try to change something." n51 Some agency regulations are relatively new and therefore not imbedded in industry practice. However, some agencies have regulations that were issued over 50 years ago. Changing agency rules that are imbedded in industry practice presents substantial challenges when agencies review their regulations.

n51. President Woodrow Wilson, Address in Detroit, Mich. (July 10, 1916) *in* BERNARD E. FARBER, A TEACHER'S TREASURY OF QUOTATIONS 46 (1985).

The perception that protective standards may be weakened is one issue. Labor organizations may support current worker protection requirements. Consumer groups advocate certain motor vehicle standards. When agencies change these types of requirements, they must present a convincing argument that the change will not diminish safety or that it will enhance worker or driver protection. Even if changes are possible that would tremendously cut implementation costs, they may not be acceptable if they reduce safety, environmental, or consumer protection even slightly. In this regard, it is interesting to note a recent case involving the Federal Highway Administration (FHWA). n52 FHWA found that it lacked data to establish a link between vision disorders and commercial vehicle safety. n53 As a result, it attempted to gather data through a controlled waiver program to determine whether it could justify a change to its existing rules. However, the governing statute permitted waivers from existing rules only if the waiver "is consistent with the safe operation of commercial motor vehicles." n54 The U.S. Court of Appeals for the D.C. Circuit overturned the waiver program because of the agency's failure to meet the statutory standard. n55 The court noted that "we are fully aware of the difficulties that the FHWA undoubtedly faces in acquiring the data on which to make an informed judgment as to whether the existing vision standards may safely be relaxed." n56

n52. *Advocates for Highway and Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994).

n53. *Id.* at 1294.

n54. *Id.* at 1293.

n55. *Id.* at 1294.

n56. *Id.*

Economic considerations are also problematic. The longer a regulation is in effect, the more likely it is that business decisions have been based on it. Industry dollars and resources may be allocated to address particular requirements. Manufacturing facilities may be built around a regulation. For example, to reduce air pollution, the EPA's rules have required industries to install smokestack "scrubbers" to reduce sulfur dioxide. n57 Furthermore, when a rule requires the use of certain forms or products, the regulated community may have large supplies on hand or have made certain capital investments. An agency needs to consider the economic burden that may result from changes to the required form or product. To respond to this problem, agencies may permit phased-in [*154] implementation. For example, the Interstate Commerce Commission has "two-tracked" implementation by accepting for a reasonable period either the old or the new, revised form. Agencies may also temporarily soften enforcement of a new rule.

n57. *See, e.g.*, Standard for Sulfur Dioxide, 40 C.F.R. § 43a (1994), U.S. ENV'T PROTECTION AGENCY, CONTROL TECHNIQUES FOR SULFUR OXIDE EMISSIONS FROM STATIONARY SOURCES (1981); *see generally*, Standards of Performance for New Stationary Sources, 40 C.F.R. § 60 (1994).

I. SPECIFIC PROCEDURES/POLICIES

"The more things change, the more they stay the same." Whether agencies are issuing new rules in response to a recent statutory mandate or changing existing rules in response to a review, the procedures and policy considerations for issuing regulations are relatively similar. Usually, the internal process for reviewing regulations does not differ from the process of issuing new regulations. The same coordination among the program, policy, and legal offices within agencies continues.

The external process of obtaining public comment is also similar to the usual rulemaking activity. Just as some agencies issue advance notices of proposed rulemaking (ANPRMs) to obtain public comment at early stages of the usual rulemaking process, some agencies seek early public involvement via ANPRMs when conducting reviews. Other agencies, such as the Economic Development Administration within the Department of Commerce and the EPA, advise the public that they are reviewing regulations by including a notice in their semiannual Regulatory Agenda. Some agencies may hold public meetings about reviews and others start with a notice of proposed rulemaking.

The policy considerations may or may not be explicit when conducting reviews. For example, the Department of Defense, the Department of the Interior, and the Federal Deposit Insurance Corporation have established criteria for reviews of existing regulations. n58 These criteria center around the age of the rule, its clarity, and its economic impacts. Generally, even agencies without established criteria will reference similar considerations when they describe the reasons for undertaking a review.

n58. *See supra* notes 32-34.

V. Suggestions for an Effective Review Program

This section contains a number of suggestions to better enable agencies to conduct reviews of existing regulations. Two important points need to be stressed.

First, they are only suggestions. The federal agencies who participated in the study are very different in many respects. Some set the basic standards under which an industry must operate. Others only establish requirements that must be met by applicants for assistance or that govern the operation of an agency program. Some have detailed, lengthy regulations that fill volumes of the Code of Federal Regulations, while others have a small body of rules for which they are responsible. Some have difficulty keeping up with rapid changes in the state-of-the art, while others have regulations that are not affected by that sort [*155] of problem. Because of these differences, it would be difficult to make specific recommendations for agency action. It seems more appropriate to provide a list of "good ideas" from which

agencies can choose. All of the agencies involved in the study recognize the importance of an effective review program and most are seeking ideas on how they could improve their efforts.

Second, adoption of these suggestions alone cannot solve what appears to be the major stumbling block to more effective review programs: the lack of agency resources to conduct reviews.

A. BASIC ELEMENTS

There are a few, basic requirements for an effective review program. They are as follows:

1. *Requirement for Periodic Reviews*

Agencies should commit to periodically reviewing all their regulations to see whether they need to be revised or revoked. Some agencies establish a schedule that takes them through each section or part of their regulations over a specified period of time. Another method would be to require a review within so many years of issuing a regulation or within a specified number of years since the regulation was last reviewed. The review need not be a formally structured proceeding involving the commitment of extensive resources (e.g., for soliciting comments on what should be reviewed, holding hearings, or conducting economic analyses). At a minimum, the agency should ensure that, within some specified time period, someone in the agency is assigned the responsibility of reviewing the information available concerning the regulation (e.g., complaints received or requests for interpretation) to determine whether any of the legal and/or policy reasons identified in section II warrant a change.

2. *Senior-Level Involvement*

Senior-level policy officials must take steps to ensure that meaningful and effective reviews will be conducted. This means ensuring that adequate personnel are assigned and, if appropriate, that deadlines are established for completion of each review. It may be necessary to assign one senior official the responsibility of ensuring that the reviews are completed as planned. This may be especially important when there are competing priorities; the senior official can "battle" for the necessary resources. Recognizing the limits on those resources and the fact that congressional mandates often require that those limited resources be assigned to other tasks, senior-level officials should be examining other approaches, such as those noted in section V.B. and ensuring, to the extent necessary, that they are utilized.

3. *Process for Identifying Problems*

Agencies should set up a process for determining whether there are problems with their rules. This process would vary depending on the type of agency. For example, an agency whose rules are enforced through inspectors might want to set up a program to identify common problems the inspectors find relating [*156] to the implementation of the regulation. There are various other approaches. For example, the process may involve surveying the regulated entities or assigning someone to review accident data. Additional ideas are discussed in section V.B.

4. *Public Participation in Identifying Problems*

Providing an opportunity for public participation in the review process can be especially valuable because the public is likely to be able to identify problems with the rules. Agencies have indicated varying success with public involvement, but most thought that under the right circumstances public participation can be quite helpful. For example, some agencies noted the value of issuing notices that asked many detailed questions of the public. Offering a channel by which the public may identify problems in a clear and precise way should provide valuable information to the agency. It also can be helpful to establish a program to periodically seek public comment on what rules ought to be reviewed. Section V.F. contains suggestions on methods for increasing the effectiveness of public involvement. To the extent an agency may question the value of public participation in a particular project or at a particular stage, it should recognize that simply providing the opportunity to comment (and providing reasonable response to the comments) often makes any final decision more acceptable to the public. Moreover, the comment may be surprisingly productive. n59

n59. Cf. 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:20 (1979) (noting benefit of using comment procedure in significant policymaking).

5. *Base for Measuring Success*

Assuming that the rule has an objective (e.g., decreasing pollution or the number of fatal accidents), then the agency needs a clear base against which to measure whether the rule is achieving its goal. To the extent that the agency has identified a problem that needs correction through the issuance of a regulation, it should be able to establish that base.

6. Sources for Data on Effectiveness

Having established a base against which to measure whether the rule is achieving its goal, the agency must then ensure that it has sources for obtaining data on whether the rule is working as planned. The agency should be able to determine whether the costs and benefits are higher or lower than intended. The agency can identify existing documents, which may include records kept by the agency or other organizations (e.g., state accident reports or National Transportation Safety Board accident reports), or it can establish new sources (e.g., it could require reports to be submitted to it on positive results under drug and alcohol testing requirements as part of its final rule, recognizing the obvious constraints of the Paperwork Reduction Act). The Nuclear Regulatory Commission has found that "regulatory impact surveys" of the regulated community work well; under this approach, agency staff visit licensees and obtain comments on generic areas (e.g., inspections or reporting requirements) and use this information [*157] to develop recommendations for amendments. Although collecting data on effectiveness is an important element of any effort to review a rule, it also can be difficult to attain. Even when a rule has direct effects (e.g., a requirement for anti-lock brakes in motor vehicles), there may be considerable debate over whether a decrease in the number of fatalities and injuries results from the rule or from other things (e.g., a decrease in drunk driving). Effectiveness may be even more difficult to evaluate when the benefits are indirect (e.g., requiring data recorders on trains and airplanes to assist accident investigators, or food content labels or warning labels on drugs).

7. Sources for Data on Changes in Technology, etc.

To the extent that an agency relies on particular technology or similar factors for a rule, it should ensure that it has sources for obtaining information on any changes in that basis. One frequently heard complaint is the inability of agencies to keep up with changes in the state-of-the-art. For example, rules written before the computer age may have required "real world" training or "hard-copy" records even though computer simulator training or electronic filing may be better for the public, the regulated entity, and the government. Agencies need to ensure that they have ways to obtain this information; this may be as simple as providing an easy process for the regulated industries to inform the agency of the need for such changes.

B. ADDITIONAL ELEMENTS

There are a number of additional steps agencies could take to improve their ability to review rules. Some of these overlap. For example, paragraphs 2, 4, and 5 suggest providing someone for the public to call with problems. However, each person (or office) plays a slightly different role within the agency; thus, an agency would not necessarily implement all of these suggestions.

1. Process for Agency Personnel to Initiate a Review

Agencies could establish a clear process for those within the agency who work with the rule and identify problems to be able to initiate a review. For example, if a litigator or an investigator finds a problem with an existing rule (e.g., many regulated entities are found to be in noncompliance because the rule is confusing), there should be a way for the problem to be identified and the need for a change to the rule to be studied. It may not be necessary for a review to be initiated simply because one investigator found one problem; however, there should be a process for the collection of these identified problems, with someone having the responsibility for determining whether a particular problem or a collection of problems warrants further action.

2. Assign Review Responsibilities

An agency could assign to specific people or offices the general responsibility for selecting rules that need to be reviewed and/or conducting the review. (These people could report to the senior official designated under section V.A.2.) People [*158] within the agency and members of the public could be provided the name of this individual as a contact point, someone they could call with problems concerning all agency rules (or rules in a particular area). This approach could be used in conjunction with or separately from section V.B.1. Agencies differ with respect to whom they assign the responsibility for conducting a review. Many have the same office that wrote the original rule review it, because that is the office with the necessary expertise. They see no failure of objectivity, noting that normal turnover and coordination processes provide extra assurance of this. Some use different offices or special teams for special projects or all reviews. Although no particular approach seems preferable, whatever approach is used should ensure that those in-

volved in implementing the existing rule are represented in the process. The vice-president's Report of the National Performance Review n60 recommended that agencies should provide better incentives for regulators. n61 This may be an area where special use can be made of that recommendation; because of the lack of resources, special incentives for the people given this responsibility concerning reviews may be especially helpful.

n60. AL GORE, *THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS* (1993) [hereinafter, *THE NPR REPORT*].

n61. *Id.* at 168 (app. C, REG 10).

3. *Periodic Meetings with Staff*

Agencies could hold periodic meetings with members of the staff who are responsible for implementing or enforcing the rules to find out whether they are having any problems or to try to determine how effective the rules are. Although information may be learned through various informal channels, scheduled, periodic meetings for the purpose of evaluating the rules may be much more effective, especially when the implementers or enforcers are located in regional offices. Those agencies that have used this approach have found it valuable.

4. *Public Contact Point*

When a rule is published in the *Federal Register*, the public is provided with the name of a person to contact within the agency if there are any questions about the rule. It also would be helpful if the agency provided in the rule, when it is issued, the name and telephone number of an individual to contact if members of the public have problems after they have begun to comply with the rule: that is, not someone to call for information, but rather someone to whom they could give information. That person would have the responsibility for determining when the information warranted a review.

5. *Ombudsman*

The agency could also consider designating an ombudsman: someone who would receive from the public their concerns or complaints about a rule or set of rules. This person would have more independence or authority than the [*159] person designated under section V.B.4 and would have the responsibility to argue at senior levels that a rule should be changed. Sometimes, simply having a person the public can easily contact may ease compliance problems. As the Administrative Conference of the United States has noted in a recommendation for ombudsmen:

the experiences of several federal agencies show that an effective ombudsman can materially improve citizen satisfaction with the workings of the government, and, in the process, increase the disposition toward voluntary compliance and cooperation with the government, reduce the occasions for litigation, and provide agency decisionmakers with the information needed to identify and treat problems. n62

n62. *The Ombudsman in Federal Agencies*, 1 C.F.R. § 305.90-2 (1994).

6. *Inspector General Studies*

Inspectors general have authority to examine the effectiveness of regulations and make recommendations for changes. Some agencies have found these studies to be valuable. Consideration should be given to asking the inspector general to conduct more studies to provide the agency an independent analysis of the need to change an existing rule.

7. *Base Priorities on Cost-Benefit Analysis*

When resources are limited and all rules cannot be reviewed, agencies could consider choosing rules to be reviewed based on the potential benefits to the public compared to the cost to the agency in time and resources. Agencies should spend their limited amount of time looking at rules where changes may provide the greatest benefits. To the extent they

have discretion, agencies could consider integrating this priority-setting for the review of rules with the agencies' general priority-setting process for rulemaking; if fixing an existing rule would have greater benefits than issuing a new one, it should be accomplished first.

8. *Base Priorities on Time Since Last Reviewed*

Alternatively, when resources are limited, agencies could decide to review rules based on how long it has been since they were last reviewed. When the benefits of the review are not obvious without doing some detailed study of the rule, it may be best to first review those rules that have gone the longest without any review.

9. *Formal Interpretations*

Agencies that do not already do so could consider establishing a formal program for issuing interpretations (and other guidance) on its rules. This program should include a method for making the interpretations (and guidance) readily available to the public. The more widely available such information is, the less confusion there should be over the rules. This might lessen the need for reviews. One approach that could help supplement the dissemination of the information [*160] would be to make it electronically available via on-line computers. A number of agencies already have established bulletin boards and similar approaches to make such information available. n63

n63. THE NPR REPORT, *supra* note 60, at 168 (app. C. REG 04); *see* AL GORE, THE NATIONAL PERFORMANCE REVIEW, IMPROVING REGULATORY SYSTEMS: ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW 37-38 (1993) [hereinafter, ACCOMPANYING REPORT].

C. FORCING MECHANISMS

There are a number of steps that could be taken to compel reviews when an agency might otherwise not conduct one. Congress or the president can mandate specific or general reviews by a certain date. In addition, either one can require "sunset" dates in particular rules, under which the rule would cease to be effective on the specified date. This would force the agency to do a review before that date to determine whether to retain the rule, revise it, or revoke it. Senior agency officials may also want to use these forcing mechanisms to ensure that a review is done. The benefit of these approaches is that they are likely to ensure that a review is done. The disadvantage is that, unless adequate resources are provided, the reviews may be relatively perfunctory and meaningless, wasting whatever resources are expended. Forcing mechanisms may cause higher priorities with more significant benefits to be ignored. Many agencies believe that setting sunset dates will result in rules simply being extended just before they would automatically terminate, again wasting resources. For these reasons, neither Congress nor the president should use such a mechanism.

Agencies, however, may want to use them in particular cases after having weighed the pros and cons. To the extent that forcing mechanisms are deemed an appropriate technique, they should be used only in narrowly focused situations where it is determined that it is necessary to apply some "pressure" and only where assessments are made of the available resources and the benefits to be derived from the review. Otherwise, the use of forcing mechanisms will merely compound the problem by wasting limited resources.

D. PROCESS FOR CONDUCTING REVIEWS

In addition to conducting reviews of specific regulations, there are a variety of approaches that agencies can consider for special problems or a more efficient approach.

1. *Periodic "Clean Up" Reviews*

This approach would be especially valuable for identifying and eliminating a number of obsolete rules that may otherwise be unrelated. It could also be helpful for other minor and unrelated changes, such as fixing outdated references, changing addresses, or generally "cleaning up" rules. As part of the review mandated by President Bush, the DOT identified more than 70 regulations that were obsolete, redundant, or could be reissued as nonregulatory guidance; the DOT issued one rulemaking document to rescind them.

[*161] 2. *Multiagency Reviews*

Sometimes problems with existing rules can be more effectively addressed by having all of the agencies that regulate in the area examine the problem at the same time. For example, a number of agencies regulate the entities handling and transporting infectious substances. A hospital may have to respond to one agency's regulation when the substances

are within the hospital; it may have to meet the regulations of another agency when the substances are transported between two points. It may make sense for the agencies involved to conduct a joint review of the regulation (as they are currently doing) to ensure that their objectives are met while imposing the least burden on the hospital. Some agencies expressed concern over the possible loss of control over decisions if multiagency reviews were used. They seemed to fear that they might have to go along with the majority or, perhaps, with a more powerful agency. Those seeking to use this approach need to be aware of this concern, especially when agencies may disagree on an approach; but agencies should not be as concerned with "control" when unnecessary overlaps or inconsistencies are identified, and it should be easy to agree on a fix.

3. *Reviews by Broad Categories*

Agencies should consider reviewing broad categories of rules rather than just specific subjects. In some instances, it may make sense to look at a specific rule (e.g., aircraft door certification standards), but in other instances, it may be more effective as well as more efficient to review a broader category that includes the particular rule (e.g., all aircraft certification standards, because the door standards may affect other parts of the aircraft). However, the advantages of reviewing a rule in the context of the entire subject area in which it is contained must be balanced against the extra time and the increased complexity involved in reviewing a larger portion of the rules. The project could be overwhelming if it is too large in scope and takes so long to complete that the changes may no longer be that helpful.

4. *Reviews by Affected Groups*

Sometimes there is benefit in taking a set of rules out of the context in which they were written and examining their effect on a specific group of regulated entities. For example, an agency may want to conduct a review of the effect of its rules on small businesses or on state and local governments. Small businesses may be only a small subset of those affected by the agency's rules; however, such a review may indicate that, cumulatively, the rules are imposing too great a burden on the small businesses and that modifications are possible that will permit the agency to achieve its objectives.

From another perspective, a group of agencies could consider conducting a review of the effect of all of their rules on a particular industry. For example, agencies like the Occupational Safety and Health Administration, the Department of Energy, the Environmental Protection Agency, and the National Highway Traffic Safety Administration could review the effect of their rules on the [*162] automobile industry. They could examine the total impact of their rules and determine whether there are better ways to achieve their objectives. They could look particularly for conflicts, inconsistencies, and overlapping requirements. To make them more manageable, such reviews could be narrowly focused; for example, they could look at the paperwork requirements imposed on an industry, concentrating on whether agencies could consolidate their requirements and use one report.

The Small Business Administration and the Office of Information and Regulatory Affairs in the Office of Management and Budget recently sponsored a "Small Business Forum on Regulatory Reform," which broke into five industry-specific work groups made up of government and industry representatives.ⁿ⁶⁴ The work groups recommended increased coordination among agencies to respond to duplicative, overlapping, and inconsistent regulations.ⁿ⁶⁵

ⁿ⁶⁴. The Forum and its process are described in its report SMALL BUSINESS FORUM ON REGULATORY REFORM, FINDINGS AND RECOMMENDATIONS OF THE INDUS. WORK GROUPS (1994).

ⁿ⁶⁵. *Id.* at 22.

E. BETTER INITIAL RULEMAKING

Doing a better job of drafting the rule that eventually will be subject to review could ease the subsequent review process. The following are examples of some steps that could be taken.

1. *Performance Standards*

Agencies could make more use of performance standards rather than design standards so that there is less need for revision as time passes and designs change. Although not always easy to draft, a well-written performance standard will, for example, accommodate changes in the state-of-the-art that a design standard will not.

2. *Consensus Standards*

In appropriate circumstances, agencies could make more use of standards established by consensus-setting organizations. Use of such an approach often makes the initial rulemaking process easier (thus freeing up resources for other reviews); it also makes necessary changes easier if those changes have been adopted by the consensus-setting organization. Indeed, after an agency has gone through a rulemaking to adopt the consensus standards, it might be appropriate to use the "direct final" rulemaking process (as discussed under section V.G.1.) to adopt any changes to the rule after they are adopted by the consensus-setting organization.

3. *Automatic Changes or Termination*

Agencies could adopt rules that provide that the rules will automatically change or terminate if certain conditions are met (or that will change or terminate by the simple publication of a notice in the *Federal Register* that the conditions [*163] have been met). For example, a rule could state that it will remain in effect until a specified number of states pass laws requiring specified action.

4. *Automatic Adjustments*

Agencies could include automatic adjustments in their rules. For example, they could use automatic inflation adjusters so that dollar amounts do not have to be constantly amended but will, rather, automatically increase in accordance with a specified inflation table. If necessary, the agency could publish a notice in the *Federal Register* advising the public of the new amount, but a rulemaking would not be necessary.

5. *Equivalent Compliance*

Where appropriate, agencies could include in the language of a rule a process for the agency head or other designated official to accept equivalent compliance with the rule in lieu of compliance with the exact language of the regulation. For example, an agency could require a specific piece of equipment to prevent pollution by a certain chemical, but state in the rule that a manufacturer can use a different device if the manufacturer can prove it will achieve the same level of protection. The Food and Drug Administration, among others, has successfully used this approach.

6. *Obsolete Rules*

When agencies write new rules that make existing rules obsolete, they could delete those rules at the same time. As simple as this may sound, agencies do not always do this, perhaps because it will add time to a rush project or because they do not think of it.

7. *Interim Final Rules/Requests for Comment*

Where agencies have the legal authority to issue a final rule but have concerns about possible implementation problems (or simply want to be assured the rule works well), they could issue an interim final rule (IFR). The IFR could be combined with a request for public comment on any implementation problems. The comment period could be extensive (e.g., one or two years), if appropriate. Although this may be considered style over substance (because the agency could issue a final rule and ask for comment later or do whatever it would otherwise do in the "interim"), it can be helpful. It sends a strong message that the agency intends to review the rule further based on additional comment, an evaluation of its implementation, some anticipated change, or other stated basis. If appropriate, the agency could place a "sunset" date in the rule to send an even stronger message and force an evaluation of the rule within a specified time. This approach can focus attention on implementation and lessen letter writing and petitioning. It has been found useful by the DOT and others.

8. *Obsolete Proposals and Interim Rules*

When agencies issue notices of proposed rulemaking that become "obsolete" because the agency does not take final action for a number of years, it could [*164] take action to formally withdraw the proposal. Similarly, if the agency issues an "interim" final rule indicating that it may change the rule based on such things as public comment or experience in implementing it, the agency needs to ensure that a final rule is issued. These good management practices may lessen confusion or concerns about existing rules (e.g., an inclination not to spend money on equipment to comply with an existing rule because the agency is considering changing it), thus easing the agency's review process.

F. PUBLIC INVOLVEMENT

Effective public involvement in the review process is important for two major reasons. First, if those subject to the regulations are having difficulty complying with them because the rules are confusing, more costly than the government

predicted, or conflict with other regulations, then the government needs to know this. If agency resources are limited, then it also would help to know which of the rules the public feels need the most attention. Second, rules can be implemented more effectively if the public is willing to accept them; the public is generally more willing to accept rules if they have had an opportunity to be heard concerning any problems and believe that those problems have been considered in a reasonable manner. The following suggestions are offered as ways to bring the public more effectively into the review process.

1. *Public Comment on Rules Needing Review*

Agencies could make an effort to periodically obtain public comment on which of their existing rules should be reviewed. They could do this semiannually, when they publish their Regulatory Agendas, or they could periodically publish a special notice in the *Federal Register*. They could also set up electronic bulletin boards to ease the process for submitting suggestions. Finally, they could periodically hold public meetings to gather suggestions on areas needing review.

When resources are limited or when agencies prefer to respond first to the most important problems, agencies could take additional steps to help the public focus their attention on those areas most in need of attention. For example, as the Federal Aviation Administration recently did, they could ask the public to identify the top three rules that they believe need review (rather than asking them to list everything without requesting priority), and then the agency could compile a master list of the most frequently identified rules. After compiling a list of rules needing review based on public comment, the agency could hold a public hearing or seek additional public comment to help narrow the list.

Some agencies have found that routine requests for comment, such as through the Regulatory Agenda, lead to little response. For the agency to succeed, it must focus public attention on the request through such things as a press release or other educational efforts. Some agencies find that one-time requests for specific public comment, such as the Departments of Transportation and Agriculture used in response to the review mandated by President Bush, can provide large numbers of useful comments. The Department of Labor has been successful with informal, fact-gathering hearings where the Department asks for ideas for changes.

[*165] 2. *Advisory Committees*

Agencies could also use advisory committees to make periodic recommendations identifying rules that need to be reviewed. The Food and Drug Administration invited public comment on what should be reviewed and then used an advisory committee to narrow the list. The agency said this worked very well. (It should be noted, however, that E.O. 12,838 limits the establishment of new advisory committees. n66)

n66. Exec. Order No. 12,838, *supra* note 46, § 3.

3. *Requests for Information*

Agencies could use general requests for information or advance notices of proposed rulemaking (if they have identified specific areas that they wish to look at more closely) to gather information on problems in implementing rules. Agency experience has shown that it is best to ask specific questions and request the supporting data to ensure that the information received will be helpful in conducting any review. The Federal Trade Commission, for example, as part of a regular cycle of review, asks for public comment on a series of questions about a rule's economic impact.

4. *Procedural Requirements for Petitions*

Agencies could issue detailed procedural requirements for the submission of petitions for rulemaking from the public. n67 The procedural rules should indicate the information the agency needs to make a decision, including certain facts and the supporting data. The agencies could indicate the legal requirements the agency must meet (e.g., environmental analyses) and ask for data to meet those needs and for the citation of statutory authority for the requested action. The agency can also ask for an explanation for any request for expeditious treatment. The more detail that the agency provides with respect to the necessary elements of a petition, the more likely it is that the agency will receive a document that will enable it to respond quickly to the need for a change in an existing rule. The agency should indicate that the more the public can provide (e.g., completely drafted proposed rules and economic analyses), the easier it is for the agency to respond with necessary changes. The vice-president's NPR Report contained a recommendation on this sub-

ject. n68 Some agencies stress the need to still verify and evaluate the petition, but a well-prepared, detailed petition should always ease the agency's job. Finally, agencies could also consider encouraging petitioners to consult with the agency before filing the petition to ensure that the petitioner understands the procedures and the underlying substantive regulation and its basis; this should help the petitioner "clarify a [*166] potential petition so that the . . . [agency] is able to understand the nature of the issues of concern to the petitioner." n69

n67. *See, e.g.*, the Food and Drug Administration Rules, 21 C.F.R. §§ 10.20, 10.25, 10.30, 10.40 (1995); *see also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *Recommendation 86-6: Petitions for Rulemaking, in Recommendations and Reports 27* (1986).

n68. THE NPR REPORT *supra* note 60, at 167 (app. C, REG 03); *see also* ACCOMPANYING REPORT at 44.

n69. Nuclear Regulatory Commission Rules, 10 C.F.R. § 2.802(b)(1)(iii) (1995).

5. Consensus Petitions

Agencies could also consider encouraging peer review of petitions for rulemaking before their submission to the agency. Petitioners could also be encouraged to discuss their petition with opposing interests (e.g., a drug manufacturers' organization may want to share its proposal with organizations representing doctors and the public) in an attempt to develop a consensus before submitting the document to the agency. Achieving consensus from a broad range of interests affected by a rule could expedite the agency's consideration of necessary changes.

6. Publish Petitions for Comment

Agencies could publish petitions, or summaries of them, in the *Federal Register* as soon as possible after receipt to obtain public comment before making a decision to grant or deny them. This may provide the agency with better information and help expedite the process by narrowing issues sooner than otherwise would occur. The Federal Aviation Administration has successfully used this approach, sometimes combining more than one petition in a single *Federal Register* notice; the agency has found it particularly helpful to obtain the views of potentially opposing interests on a petition.

7. Training Courses for the Public

One way to make the process work more effectively and efficiently is to ensure that the public understands how it works. Some agencies complain that frequently the public asks Congress to force the agency to make a change before it has asked the agency to do so. Hopefully, adoption of many of the suggestions in this report will convince the public to try the agency first. However, even good procedures are useless if the public is unaware of them.

Agencies could consider providing a training course or developing educational material that explains to the public both how the rulemaking process works and how the public can use it more effectively, especially to achieve necessary changes to existing rules. Such a course could emphasize, for example, the elements of a good petition for rulemaking, explaining to the public the information that it needs to include to enable the agency to understand why a change is warranted. In addition, educating the public as to the various requirements that the agency must meet before it can make a change to a rule (e.g., a specific statutory mandate, the Administrative Procedure Act, and various executive orders) may enable the public to appreciate better the substantive obstacles to the change desired as well as the time necessary for accomplishing it.

VI. Suggestions for Other Actions

This section contains a number of additional suggestions for actions that agencies can take that will not directly improve the review process but that will [*167] help in other ways, for example, by improving the general rulemaking process or providing incentives to do reviews.

A. BETTER RULEMAKING AFTER REVIEWS

Just as there are ways that an agency can write the initial rule to make it less likely that it will need to be revised or revoked, there are also ways that an agency can make it easier to adopt any revision or revocation that is determined to

be necessary after conducting a review. In fact, these practices would ease the rulemaking process in general, not just for reviews. The following are some suggestions in this regard.

1. Streamlining

A few years ago, one agency found that it had a rulemaking process so cumbersome that it took an 18-foot long flow chart to describe it. Even well-run agencies are finding that there are additional steps they can take to streamline further their rulemaking process. There are offices whose concurrences are required for rulemaking, but who never submit any comments and could be eliminated from the process. There are offices that review documents sequentially that could review them concurrently to save time. There are senior officials whose review of documents is required but unnecessary, such that delegation would be appropriate. Better use of computer technology for tracking rulemaking actions can be utilized. Training courses can be developed to lessen the delays caused by mistakes. These and many other ideas are already identified and being implemented by agencies throughout the federal government in response to an NPR Recommendation n70 and a memorandum from the president. n71

n70. THE NPR REPORT, *supra* note 60 (app. C, REG 05).

n71. Memorandum Agency Rulemaking; 2 PUB. PAPERS 1635 (Sept. 30, 1993).

Increased efforts by agencies in this regard will help them to conduct reviews and to issue necessary changes more expeditiously and, thus, with less cost. If agencies streamline the general rulemaking process, they should also free more resources for regulatory reviews. In examining how their particular processes can be streamlined, agencies should pay particular attention to the process for reviewing existing regulations to determine whether special changes to this process are warranted.

2. Direct Final Rules

Agencies should consider direct final rules to speed the process of revising or revoking existing rules, where appropriate. This process involves the issuance of a final rule without a prior opportunity for public comment, when the agency determines that it is unlikely to receive any comments. n72 The final rule preamble indicates that it will go into effect within a specified time period (generally 60 days) n73 if the agency receives no adverse comment or notice of intent to file a [*168] comment within a specified time period (generally 30 days). n74 The incentive for the agency to use its judgment wisely is that, if it does receive any comment or intent to file comments, then it must withdraw the final rule and issue a notice of proposed rulemaking. Based on the EPA's successful use of this process, the vice-president's National Performance Review Report recommended that agencies consider its use. n75 Direct final rules may be especially appropriate for certain, corrective rulemaking actions deemed warranted as a result of a review. For example, an agency may wish to use this process for deleting obsolete rules or fixing clear "mistakes" in existing rules.

n72. THE NPR REPORT, *supra* note 60, at 168 (app. C, REG 05); *see* ACCOMPANYING REPORT, *supra* note 63, at 42-44.

n73. ACCOMPANYING REPORT at 44.

n74. *Id.*

n75. *Id.*

B. ADDITIONAL STEPS

1. Congressional Awareness

Considering the extent to which agencies are concerned that the need to commit resources to implement statutory mandates limits their ability to conduct reviews that ultimately may be more beneficial than implementing the statutory mandate, then agencies should consider taking more steps to ensure that Congress is aware of these limitations. For example, perhaps agencies could periodically brief appropriate congressional staff on areas the agency is considering reviewing, the benefits that may result, and the limited resources they have to devote to such a review. If members of the public agree with the agency on the benefits of particular rules versus new legislation, they, too, should make their views known to Congress.

2. Rulemaking Executive Orders

There is also concern among the agencies that the various executive orders that affect rulemaking impose unnecessary burdens on the rulemaking process and make it more difficult and time-consuming. n76 The American Bar Association (ABA) shares this concern. An ABA resolution "urges the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned analyses." n77 Some agencies also suggested that the Office of Management and Budget (OMB) review of regulations should be limited to expedite the issuance of rules. Subsequently, OMB review was restricted through E.O. 12,866, which limits OMB review to "significant" rules and establishes deadlines for that review. n78

n76. *See supra* note 49.

n77. AMERICAN BAR ASSOC., 1992 MIDYEAR MEETING 18 (1992) (Admin. Law and Reg. Practice Report No. 113).

n78. Exec. Order No. 12,866, *supra* note 20 at § 6.

Because general improvements to the rulemaking process would also ease the burdens on the review process, the agencies should take steps to have the executive branch review the merits of the various executive orders that affect rulemaking and consider whether some of them can be eliminated or consolidated to [*169] improve the efficiency of the process. The Regulatory Working Group, created by E.O. 12,866, n79 would appear to be an appropriate organization to direct this review. It is an organization consisting of representatives of the various regulatory agencies and departments and other senior administration policy officials. It is chaired by the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget.

n79. *Id.* § 4d.

3. Incentives for Reviews

The executive branch, Congress, and the public should consider whether there are possible trade-offs that would provide incentives to agencies to conduct reviews. For example, one agency suggested it might voluntarily use sunset dates in rules if it were authorized to automatically adopt a notice of proposed rulemaking as a final rule if there were no public comments on the proposal. A simple notice in the *Federal Register* (signed by a mid-level official), stating that no public comment was received and that the rule language contained in the notice of proposed rulemaking is automatically adopted as final, would greatly ease the rulemaking process for the agency. Then the agency might be willing to accept the burden of the review forced by the sunset date.

VII. Conclusion

The agencies, as well as the public, recognize the need for periodic review of existing rules to determine whether those rules need to be revised or revoked. The agencies, however, also generally stress the lack of resources to accomplish reviews effectively and the lack of good information on which to base decisions. At the same time, the public often does not understand the opportunities already available to it for obtaining a review, the extent to which informal reviews are being conducted, or how it can help its chances for an effective and quick review. The purpose of this report is to provide a list of ideas from which agencies could choose, as appropriate, to help them address some of these problems; to help them to conduct better, more efficient reviews; and to educate and involve the public. It is also hoped that, when appropriate, the public will suggest to the agencies that they use some of the ideas contained in this report.

[*170] **APPENDIX A**

April 6, 1993

General Counsel
 Department of Transportation
 400 Seventh Street, S.W.
 Room 10428
 Washington, D.C. 20590

Dear General Counsel:

The American Bar Association Section on Administrative Law and Regulatory Practice is conducting a study of federal agency review of existing regulations. Under statute, executive order, or agency procedure, federal agencies, for a number of years, have been reviewing existing regulations to determine whether--because of such events as changes in technology, increased or decreased cost, or enforcement problems--a rule should be revised or revoked. Last year, then-President Bush ordered a 90-day moratorium on the issuance of new regulations and directed federal agencies to review all of their existing regulations during the moratorium. This specific experience, as well as agencies' general experience in dealing with the review of existing regulations, resulted in an interesting program on the process for, and the problems in, conducting reviews at our Section meeting in the Fall of 1992.

As a result of that program, we believe that it would be valuable for the Section to explore the issue further. Basically, what we are interested in is what steps you have taken to enable your agency to conduct effective and efficient reviews of existing regulations. At a minimum, we hope to compile a list of agency procedures or suggestions on how to accomplish what for many can be an extremely difficult and time-consuming process. A compilation from many different agencies could be valuable to each of you when you undertake future reviews. It is also possible that, as a result of our study, we can make specific recommendations to help agencies more effectively conduct reviews.

In that regard, we would appreciate your assistance in helping us to gather information based on your experience in conducting reviews both in general as well as specifically in response to President Bush's order. Although we particularly seek answers to the series of questions that follow, we would also encourage any general comments you would like to make. We recognize the detailed nature of our questions and the time burden they impose, but we believe they can produce valuable information that we can share with you at a later time. We thank you in advance for taking the time to answer our inquiries.

We also recognize that some changes to existing rules may result from a "formal" review (e.g., as part of a regular process, this year you decide to review your certification rules) and some from an "informal" review (e.g., your enforcement staff advises that your certification rules are not working well [*171] and need certain fixes). In your answers, please note how these or other factors affect your response.

General

1. Please briefly describe the nature and extent of your existing rules. Please describe any agency-specific statutory requirements concerning review of your rules. In 10 years, prior to President Bush's order, approximately what percentage of your rules were reviewed? As a result of those reviews, what percentage were changed? During that time period, did you issue new rules? By what percentage did this increase your total rules? We are interested in learning about your workload and the progress you have made, which requires some explanation of the range of complexity in these rules, so please feel free to expand on your answer.

Public Participation

2. In your semi-annual regulatory agenda, do you ask for public comment on what existing regulations of your agency, if any, should be reviewed? How much public response does this elicit?
 3. How many petitions for rulemaking do you receive annually asking for changes to existing regulations? How many are granted in full or in part?

4. When you have conducted a review of an existing regulation in the past:
 - a. At what stage(s) did you involve the public? (E.g., did you ask for comment on whether a particular rule ought to be reviewed or seek comment only after proposing a particular change?)
 - b. How did you involve the public? (E.g., did you hold public hearings seeking discussions of what rules needed change or just seek written comments on the proposed list of rules you were considering revising?)
 - c. Why did you use a particular approach?
 - d. Do you have other ideas for better public involvement?

Review Process

5. Please explain in what ways--and why--your process for reviewing an existing regulation differs from your "normal" process for developing an amendment to an existing regulation (e.g., because of a change in statutory authority).
6. What particular problems do you find in reviewing regulations that have been in effect for many years and may be imbedded in industry practice? How do you handle these problems?
7. Do you review a particular regulation (e.g., a requirement for a door on an aircraft) or a general area (e.g., certification requirements for the entire aircraft)? If the former, do you find it difficult to find the time to review all your regulations one-by-one? How do you account for the economic and other effects of interrelated rules, if you do not review them as a group? [*172] (E.g., a requirement for a door may have an effect on aircraft frame requirements.) If the latter, how do you keep the process manageable? (E.g., one agency found that review of only 11 of its CFR parts out of a total of 73 CFR parts resulted in almost 2,000 suggestions for changes and ended up resulting in 8 NPRMs with close to 600 proposed changes, with each of the NPRMs averaging about 200 pages. The whole process took eight years to complete.)
8. Do you do cross-cutting reviews (e.g., looking at the effect of all your rules on small businesses or on state and local governments)?
9. Have you done multi-agency reviews where you have worked with other agencies whose rules also have an effect on the industry that you regulate?
10. What do you see as the advantages or the disadvantages of the different approaches?

Staffing

11. Do you have the same people or office that wrote the original rule conduct the review, or do you use a special team or different office? If you use the original office or staff, do you find that they can be objective in analyzing the need for changing the original product?
12. Do you involve in the review people who do not normally write regulations but who are involved in their implementation (e.g., investigators, enforcement attorneys)? If so, please explain the advantages and disadvantages.

Impact Analyses

13. To what extent do you do economic or other analyses as part of your review process? Are these analyses as thorough or detailed as those that would otherwise accompany a proposed or final rulemaking? If not, why not? How do you handle the analyses of rules that have been in effect for many years (especially these that did not have an economic analysis performed on them before their adoption)?
14. Can a health or safety agency realistically consider changing a rule to make it much more cost-beneficial, if, in doing so, there would be more deaths or injuries? (E.g., if safety measure X would save 1,000 lives a year at a cost of \$ 1 million per life saved and safety measure Y would save 1,100 lives but

at a cost of \$ 2 million per life saved, it might be acceptable to issue a rule requiring only safety measure X, but would it be acceptable to change a rule requiring safety measure Y to one requiring only safety measure X?) How do you handle or justify changes such as these?

... [*172] *Resources and Time*

15. With reference to question 7, can agencies afford to spend the amount of time and effort it takes to regularly review regulations in a thorough and effective manner? More directly, do you have the resources to review existing [*173] regulations as well as write the new ones you are required to issue? Please provide details.

16. Because of the amount of time that may be necessary to do an appropriate review and because of, among of other things, the number of statutes including deadlines for new rules, agencies may find it difficult to routinely and regularly review existing regulations. How do you balance the need for new rules vs. reviews?

17. What special steps do you take to expedite the review process? Which have you found especially helpful?

18. Would it be advisable for reviews to be mandated by legislation or executive order to ensure they were done? Do you use "sunset" dates in any of your rules to ensure that they will be reviewed? When do you do so? What do you see as the advantages or disadvantages of these different methods of ensuring reviews?

19. Do you believe that reviews (e.g., President Bush's) generally result in effective changes? (E.g., can you keep up with state-of-the-art if you take seven or eight years just to review selected parts of your regulations?) Please explain your answer.

20. At the same time, can agencies ignore the need to keep their rules effective and up-to-date? In this regard:

a. Are there better, more effective ways to do this? What are they? Do they require legislative change? Would the sacrifice of some procedural requirements be worthwhile?

Please explain your answer. What are some of the legislative changes that you believe would be worthwhile? Who [sic] do you see as the pros and cons?

b. Are there non-legislative changes outside the control of your agency that would help? What are they and what are their advantages and disadvantages?

c. Are there burdens that could be appropriately shifted to the public? (E.g., should a regulated industry be asked to support a request for change with a sophisticated analysis of economic and other factors?) What are the burdens you think could be shifted? Could these burdens be shifted effectively? (I.e., would industry's analysis be helpful, saving the agency time and money?) Have you had experience with this? Please explain. What do you believe are the pros and cons?

We would appreciate receiving your responses by May 31, 1993. If you have any questions about this letter or our project, please do not hesitate to call Neil Eisner (202-366-4723), the member of our Section who is in charge of the project. It would also be helpful if you could provide the name and telephone number of a person we could contact if we have any follow-up questions.

Peter L. Strauss
Section Chair

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APPENDIX B**DEPARTMENTS AND AGENCIES PARTICIPATING IN STUDY**

Department of Agriculture 14th Street and Independence Avenue NW Washington, DC 20250	Department of Health and Human Services 200 Independence Avenue SW Washington, DC 20201
Department of Commerce 14th Street and Constitution Avenue NW Washington, DC 20230	Department of Housing and Urban Development 451 7th Street SW Washington, DC 20410
Department of Defense Pentagon Washington, DC 20301	Department of the Interior 1849 C Street NW Washington, DC 20240
Department of Energy 1000 Independence Avenue SW Washington, DC 20585	Interstate Commerce Commission 12th Street and Constitution Avenue NW Washington, DC 20423
Environmental Protection Agency 401 M Street SW, LE 130 Washington, DC 20460	Department of Labor 200 Constitution Street NW Washington, DC 20210
Federal Deposit Insurance Corporation Washington, DC 20429	Small Business Administration 409 3rd Street SW Washington, DC 20416
Federal Trade Commission 6th Street and Pennsylvania Avenue NW Washington, DC 20580	Department of Transportation 400 7th Street SW Washington, DC 20590
General Services Administration 18th and F Streets NW Washington, DC 20405	Department of Veterans Affairs 810 Vermont Avenue NW Washington, DC 20420